Supreme Court, U. S.
FILED
AUG 11 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-236

NEW CASTLE-GUNNING BEDFORD SCHOOL DISTRICT,
Petitioner,

v.

BRENDA EVANS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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v.

BRENDA EVANS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner respectfully requests that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Third Circuit in cases of Evans, et al. v. Buchanan, et al. (Nos. 76-2103/2107), in which this Petitioner was Appellant in No. 76-2105.

OPINION BELOW.

The opinions of the Court of Appeals for the Third Circuit are not yet reported. They are set forth as Appendix A (pp. A1 to A41) in the Petition for Writ of Certiorari filed herein by Delaware State Board of Education, et al., Petitioners. The opinions of the United States District Court for the District of Delaware are reported at 416 F. Supp. 328 (1976). The opinions on the interlocutory judgment of the District Court ordering the

parties to submit proposed interdistrict and single-district desegregation plans for the Wilmington schools are reported at 379 F. Supp. 1218 (D. Del. 1974) and 393 F. Supp. 428 (D. Del 1975). An appeal from the interlocutory judgment was taken to this Court, which summarily affirmed that judgment. 423 U. S. 963 (1975).

JURISDICTION.

The opinion of the United States Court of Appeals was filed on May 18, 1977. This Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1254.

QUESTIONS PRESENTED.

1. Was the decision of the Court of Appeals in conflict with applicable decisions of this Court on an important question of federal law, where it ordered an interdistrict remedy in a school desegregation case in the face of a finding of no segregatory or discriminatory intent?

2. Did the Court of Appeals depart from the accepted course of judicial proceedings, so as to require the exercise of this Court's power of supervision, when it held it was foreclosed by the "law of the case" doctrine from reviewing a determination of the lower court (in conflict with applicable decisions of this Court), by reason of the summary affirmance of the lower court's interlocutory judgment by this Court, on the theory that this Court's summary affirmance embraced all issues which might have been decided, but were not necessarily resolved?

3. Will this Court now permit a lower court's decision (affirmed by the Court of Appeals on the "law of the case" doctrine) to stand, even if such decision is in conflict with other applicable decisions of this Court?

STATEMENT.

A system of free public schools began in Delaware in 1829 with the adoption of "An Act for the Establishment of Free Schools", 7 Laws of Del. 184, which provided for the laying out of school districts in each of the counties. In general, each district was to be of such size that the most remote part thereof was not more than two miles from the center and each district was to contain a single schoolhouse to be located near the center of the district.

Pursuant to the 1829 statute 72 school districts were laid out in New Castle County, 45 in Kent County and 78 in Sussex County. By 1852 there were nine united school districts in the City of Wilmington. In that year these separate districts were brought under the governance of a newly incorporated board of education designated "The Board of Public Education in Wilmington" (10 Laws of Del. 644). The Board of Public Education in Wilmington historically has supervised the largest, wealthiest and most powerful district in the state. In 1905 the boundaries of Wilmington School District were defined by statute as coterminous with the boundaries of the City of Wilmington, including any future additions thereto, 23 Laws of Del., Ch. 92 (1905). This explicit statutory designation in 1905 confirmed the geographic identity of Wilmington School District and the City of Wilmington which had existed for the preceding 50 years. Since the 1905 statute the boundaries of Wilmington School District have continued to be the same as the boundaries of the City of Wilmington; and the statutory provisions relating to the geographic designation of the Wilmington School District have been carried forward explicitly in amendments to the school laws; 32 Laws of Del., Ch. 163 (1921), 37 Laws of Del., Ch. 202 (1931), 55 Laws of Del., Ch. 172 (1965),

and finally in the Educational Advancement Act, 56 Laws of Del., Ch. 292 (1968).

A dual system of public education was mandated in Delaware by Article X, Section 2 of the Delaware Constitution of 1897. Between that date and the decision in *Brown v. Board of Education of Topeka,* 347 U. S. 483 (1954), the schools in the school districts of each county were segregated by law. The challenge in Delaware to the constitutionality of that system was mounted in *Gebhart v. Belton,* Del. Supr., 91 A. 2d 137 (1952), which became one of the four cases decided in *Brown.*

Less than three months after *Brown I* and without awaiting the guidelines concerning remedy which came down in *Brown II,* 349 U. S. 294 (1955), the Board of Public Education in Wilmington voted to abolish the dual school system in Wilmington. A few months later the State Board of Education directed all school districts in Delaware to submit plans for the desegregation of their districts. Wilmington desegregated its elementary schools in 1954, its junior high schools in 1955 and its high schools in 1956. The status quo, described in *McDaniel v. Barresi,* 402 U. S. 39, 41 (1971), as "the very target of all desegregation processes" was altered voluntarily, promptly and substantially in Wilmington.

Likewise, the other school districts in New Castle County moved promptly to admit black students into formerly white schools. In rural Kent and Sussex Counties, however, change occurred more slowly and the present tion in those counties. *Evans v. Buchanan* began in 1956 on the complaint of black residents of a rural school district in Kent County. Subsequently, additional plaintiffs intervened from other districts in Kent and Sussex Counties and the case proceeded as a class action involving the entire state. Summary judgment for the plaintiff

was granted in 1957, *Evans v. Buchanan,* 152 F. Supp. 886 (D. Del. 1957), and was affirmed on appeal, 256 F. 2d 688 (3rd Cir. 1958). In 1959 a proposed plan of integration submitted by the State Board of Education was approved with certain modifications,[1] 172 F. Supp. 508; 173 F. Supp. 891. Plaintiffs appealed and the Court of Appeals found that the approved plan did not effect desegregation with sufficient speed,[2] *Evans v. Ennis,* 281 F. 2d 385 (3rd Cir. 1960). The mandate of the Court of Appeals ordered the State Board of Education to submit a plan of approval of the District Court which would provide:

> "(A) for the integration at all grades of the public school system at the fall term 1961, and at all subsequent school terms, of all Negro school children who desire integration subject to the usual processing of the school system; and
>
> "(B) for a 'wholly integrated' school system, whereby adequate school facilities at all grades will be provided on a racially nondiscriminatory basis."

Pursuant to that mandate the State Board of Education prepared a plan which was modified and approved by the District Court in June 1961, *Evans v. Buchanan,* 195 F. Supp. 321 (D. Del. 1961). Part A of the approved plan provided, beginning with the 1961 fall term, for admission on a racially nondiscriminatory basis of all Negro children who desired to attend white schools. This short-term remedy, however, did not provide for dismantling the dual systems which had earlier been described by the Delaware

1. The plan approved by the District Court did not affect Wilmington School District which had already integrated its schools.

2. The Court noted, however, that Delaware "already has integrated many of its schools, particularly in the Wilmington metropolitan area." 281 F. 2d at p. 393.

Supreme Court as a "maze" of overlapping white and colored school district boundaries, *Steiner v. Simmons,* Del. Supr., 111 A. 2d 574, 580 (1955). Part B of the plan was addressed to the elimination of those systems.

Part B consisted of a proposed new school code which would eliminate Delaware's separate colored school districts[3] and establish 30 unitary districts. Significantly, there was to be no change in the Wilmington School District; its boundaries were to remain coterminous with the boundaries of the City of Wilmington just as they had for the preceding 100 years. It was originally thought that the consolidation of school districts envisaged in Part B required legislative action; and it was stated in the plan that the State Board of Education expected it to become effective at or before the fall term of 1970.

The District Court approved Part B without modification in its opinion of June 26, 1961, and in the order entered on July 24, 1961. No parties to this suit raised any objection to the District Court's approval of a long-range plan for Delaware which included the continuance of Wilmington's historic school boundaries.

Except for a dispute about the attendance areas in one rural New Castle school district in 1962, *Evans v. Buchanan,* 207 F. Supp. 820 (D. Del. 1962), this case was dormant from July 24, 1961 when the District Court approved a plan for total integration throughout the state (including retention of Wilmington School District's historical boundaries) until July 27, 1971 when the current plaintiffs filed a petition for a supplemental order claiming violation of the constitutional rights of black students in Wilmington School District.

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3. There were no separate colored school districts in Wilmington; all schools there were under the supervision of the Board of Public Education in Wilmington.

Although the State Board of Education had thought legislative action was necessary to eliminate colored school districts, it later determined that it would be feasible to achieve this result by vigorous administrative measures; and it proceeded to do so. In the process all black students and teachers were absorbed into the unitary districts and by the spring of 1967 the last vestiges of the dual system had been eliminated. At that point everyone believed that Delaware had fully complied with the requirements of *Brown*. In fact, officials of the Department of Health, Education and Welfare singled out Delaware as the first southern or border state which had completely eradicated the dual system of public education.

Long before *Brown I* it had been recognized that there were too many small, inefficient districts in Delaware, particularly in Kent and Sussex Counties, and that consolidation of such districts would improve the quality of education. Bills to accomplish this were submitted to the Delaware General Assembly in 1955, 1961 and 1963 but none were acted upon favorably. None of these bills proposed any change in the Wilmington School District which was then the largest district in the State.

Beginning in 1965 a serious effort was begun to publicize the need for reform and to obtain the support which was required to achieve passage of the necessary legislation. This effort culminated in passage of the Educational Advancement Act, 56 Laws of Del., Ch. 292 (1968).

The format of the Educational Advancement Act was to prescribe general criteria for the consolidation of school districts and to empower the State Board of Education for a period of one year to consolidate existing districts pursuant to such criteria. The statutory criteria included requirements that existing districts not be subdivided, that only contiguous districts be consolidated, that there be not

less than 20 nor more than 25 reorganized districts, that each district offer complete instructional programs for grades 1 through 12, and that consolidated districts contain not less than 1,900 nor more than 12,000 pupils in grades 1 through 12.

The act also provided that the Wilmington School District shall be the City of Wilmington with the territory within its limits.

The upper limit of 12,000 pupils meant that three districts in New Castle County could not be consolidated with contiguous districts by the State Board of Education. Wilmington School District and Newark School District each had more than 12,000 pupils and Alfred I. duPont School District, if consolidated with any of the four districts contiguous to it, would have exceeded the 12,000-pupil limitation in the reorganized district.

The District Court conceded in its opinion of March 27, 1975 (393 F. Supp. at 443) that the drafters of the Educational Advancement Act were concerned about a State constitutional problem but it concluded that such concern was based on an erroneous view of the law. The District Court held that such erroneous belief was not a compelling state interest which would validate the statutory continuation of Wilmington School District's historic boundary lines during the one-year period in which the State Board of Education was authorized to consolidate school districts in accordance with prescribed criteria. The District Court then used the compelling state interest test to find that it was unconstitutional for the Delaware General Assembly to retain by statute the historic boundaries of Wilmington School District because of the racial impact of such retention, despite the fact that the District Court expressly found that it could not conclude that such provisions were purposefully racially discriminatory (393

F. Supp. at 439). The District Court held that the Educational Advancement Act, neutral on its face, without a racially discriminatory purpose, and serving legitimate and important governmental purposes, was invalid under the Equal Protection Clause simply because of the racial consequences of retaining school district boundaries which had existed for more than 100 years. This holding is directly contrary to *Washington v. Davis,* 426 U. S. 229, and *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.,* 97 S. Ct. 555 (1977).

REASONS FOR GRANTING THE WRIT.

A. Wilmington Had Achieved Full Compliance With *Brown*.

The District Court's opinion of July 12, 1974 (379 F. Supp. 1218) [4] acknowledged that desegregation had begun twenty years earlier when Wilmington began to desegregate voluntarily for the 1954-55 school year; that the bulk of the desegregation process was complete by the 1956-57 school year, that Wilmington was one of the first, if not the first school district in Delaware to desegregate, and that many school officials assumed that the dual system had been abolished.

Nevertheless, the District Court held that segregated schooling was never eliminated in Wilmington only because the formerly black schools remained identifiably black. However, in Wilmington there was no "foot dragging" by a "reluctant" school board such as engaged the attention of this Court in *Green v. County School Board*, 391 U. S. 430 (1968); *Raney v. Board of Education*, 391 U. S. 443 (1968); *Monroe v. Board of Commissioners*, 391 U. S. 450 (1968); *Swann v. Board of Education*, 402 U. S. 1 (1971); *McDaniel v. Barresi*, 402 U. S. 39 (1971).

In *Swann* the Court said that in school districts where segregated education was formerly mandated by law the continued existence of identifiably white and identifiably black schools establishes a *prima facie* case of constitutional violation. But here the District Court ignored the fact that in Wilmington the formerly white schools were promptly opened to blacks and soon ceased to be identifiably white; by 1973 a person unfamiliar with the history

4. It should be noted that this opinion finding unconstitutional segregation in the Wilmington School District was rendered before this petitioner was made a party in this case.

of Wilmington schools could not tell from the racial enrollments which schools were formerly white. By 1973, Wilmington, which was desegregated by 1956, had long since reached the point where instead of black schools and white schools there were simply schools.[5] At that point Wilmington had achieved full compliance with *Brown* and further intervention by the District Court was uncalled for absent any showing (and the District Court found none in its July 12 opinion) that school authorities or other State agencies had "deliberately" attempted to alter demographic patterns to affect racial composition of the schools, *Swann*, 402 U. S. at 32; *Milliken*, 418 U. S. at 745. Cf. *Pasadena Board of Education v. Spangler*, 427 U. S. 421 (1976), and *Austin Independent School District v. United States*, 97 S. Ct. 517 (1976).

B. There Was No Interdistrict Violation.

The District Court's opinion of July 12, 1974 (379 F. Supp. 1218) concluded with a direction to the State Board of Education to submit alternate plans for the desegregation of Wilmington School District—first, an intra-district plan—and second, a plan incorporating other undesignated school districts in New Castle County. Before such submission this Court's opinion in *Milliken v. Bradley*, 418 U. S. 717 (1974), came down. At that point the District Court invited the New Castle County school districts outside Wilmington to intervene as parties defendant and asked all parties to brief the effect of *Milliken* on the propriety of an interdistrict remedy in this case. After briefing and argument, the District Court,[6] in a two to one

5. The fact that such schools were predominantly black does not mean that they were not desegregated. *Milliken v. Bradley*, 418 U. S. at 740.

6. This Court has heretofore determined by dismissing a direct appeal from the District Court that it was not properly constituted as a three judge court on the remedy issue.

decision, held that an interdistrict remedy was permissible, 393 F. Supp. 428.

Although the Wilmington and Detroit cases were indistinguishable, the District Court strained to reach a contrary result. It began, properly enough:

> "In short, this Court, in light of the Milliken holding, is authorized to consider desegregation relief embracing more than the Wilmington district only upon findings either that school districts in New Castle County are not meaningfully separate and autonomous or that there have been racially discriminatory acts of the State or of local school districts causing interdistrict segregation. Because our opinion of July 12, 1974, made no findings concerning inter-district constitutional violations, we must now make additional findings on these issues." 393 F. Supp. at 432.

1. SEPARATE AND AUTONOMOUS SCHOOL DISTRICTS.

The Court then touched on historical aspects of the relationship between Wilmington and the suburban districts but concluded:

> "Since the 1950's however, Wilmington and suburban schools have, to a great extent, operated independently of one another. The suburban districts have, for the past several years, operated unitary schools for the children residing within their districts." 393 F. Supp. at 437.
>
> * * *
>
> "There is no evidence in the record which indicates that suburban schools in New Castle County are presently operating other than unitary schools for the children residing in their districts." 393 F. Supp. at 437, n. 19.

Despite the District Court's inability to find that school districts in Delaware are not separate and autonomous, it hints that the pre-*Brown* interrelationship between Wilmington and the suburban districts would have justified an interdistrict remedy. This concept is disturbingly irrelevant because the pre-*Brown* interrelationship only discriminated against black students from the suburban districts, whereas this case is concerned only with black students in Wilmington who were never discriminated against by Wilmington's interrelationship with the suburban districts. Before *Brown*, this interrelationship involved sending suburban black students, particularly high school students, into the black schools in Wilmington when there were no separate facilities for them in the suburban districts. This constitutional violation was cured in the 1950s and 1960s by eliminating the dual systems which had existed in suburban districts and admitting students regardless of race into all schools in the districts where they resided. All school districts in New Castle County are and for many years have been separate, autonomous and unitary; and no child in New Castle County, Delaware, is denied admission to any school in the district in which he resides because of race or color.

Judge Layton summed up this aspect of the majority opinion in his dissent:

> "Findings to the effect that prior to 1954 there were interdistrict transfers of black and white students from the suburbs to Wilmington which affect present-day school attendance are, to my mind, *non-sequitur*. The majority acknowledges, but gives no significance to, the reasons for such arrangements—that two decades ago, Wilmington had better educational facilities, full twelve-grade programs, etc. They acknowledge that these practices have not existed for years. But

finding that after the termination of these interdistrict transfers Wilmington's schools became identifiably black, the majority apparently infers that the present black population is in part the result of such transfers. There is no evidence to support such a conclusion." 393 F. Supp. at 448.

2. HOUSING.

The District Court proceeded to consider other ways to distinguish *Milliken*. It could find no evidence (because there was none) of racially discriminatory acts of any of the suburban school districts causing interdistrict segregation. It turned, then, to an attempt to show racially discriminatory acts of the State of Delaware causing interdistrict segregation. It found that the increase of black population and the decline of white population in Wilmington resulted from governmental action, citing the FHA Mortgage Underwriting Manual in use between 1936 and 1949 which advocated racially and economically homogeneous neighborhoods; the existence of racial discrimination in some private sales and rentals prior to 1968; the continued recording of deeds with nugatory racial covenants; public housing policies which resulted in the construction of substantial numbers of units in Wilmington and relatively few units in the suburbs; and a provision in the Code of Ethics of the National Association of Real Estate Boards (which was eliminated in 1970) counseling realtors not to introduce into neighborhoods peoples whose race, nationality or other characteristics would be detrimental to property values.

Comparable evidence, but in far greater depth and detail, was introduced in *Richmond* and *Detroit* and found unpersuasive. The thinness of the evidence in this case and its acceptance by the District Court, coupled with its

obeisance to and defenestration of *Milliken*, leads to the belief that despite *Milliken* the District Court was determined to remedy the "condition" rather than the "constitutional violation."

Judge Layton put it well in his dissenting opinion:

> "My impression of this evidence at the conclusion of the trial was (and still is) that it fell flat. Much of the record concerns circumstances which are not the result of State action. The majority concedes that twenty-seven years ago the Supreme Court declared racial covenants contained in deeds to be of no legal effect. The majority cites no authority requiring the Recorder of Deeds to cull out and delete this sort of material from the numerous deeds filed daily for recording; nor does it attribute any specific legal significance to failure to cull out such language. In my judgment, the only hard evidence of State action appearing in the mass of evidence dealing with real estate discrimination is the State publication, until 1970, of the N. A. R. E. B. Code of Ethics. Moreover, this Code was not exclusive to Delaware, presumably it extended nationally from Maine to Georgia, and from Washington, D. C. to California."
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> * * *
>
> "In my view, the majority's findings, so sweeping in effect, so heavy with inferences but so lacking in concrete, relevant substance, have fallen far short of fixing the responsibility for inter-district racial discrimination upon Defendants' shoulders." 393 F. Supp. at 448-9).

The "only hard evidence" fell woefully short of the standard suggested by Mr. Justice Stewart in his concurring opinion in *Milliken:*

"No record has been made in this case showing that the racial composition of the Detroit school population or that residential patterns within Detroit and in the surrounding areas were *in any significant measure caused by governmental activity,* and it follows that the situation over which my dissenting Brothers express concern cannot serve as the predicate for the remedy adopted by the District Court and approved by the Court of Appeals." 418 U. S. at 756, n. 2. (emphasis supplied).

3. The Educational Advancement Act.

The central issue in the trial of this case was whether the Educational Advancement Act of 1968 amounted to unconstitutional interdistrict segregation.

The purpose and provisions of the Educational Advancement Act and some of the problems involved in its enactment have already been alluded to, *supra.* The significant findings of the District Court concerning the statute appear in the following passage:

"We cannot conclude, as plaintiffs contend, that the provisions excluding the Wilmington District from school reorganization were purposefully racially discriminatory. To be sure, all legislators may have known that the Wilmington School District was predominantly black. On the other hand, the focus of the legislature's concern in developing the consolidation provisions of the Educational Advancement Act was on small, weak, ineffective school districts, and while the effectiveness of schooling in Wilmington at this time has been disputed, it is clear that Wilmington had larger staffs and better programs than many Delaware school districts. Moreover, Wilmington had historically been treated distinctively in Delaware

education, and there is evidence that its representatives were unwilling to forego certain aspects of this special treatment. No language in the provisions at issue makes any reference to race, nor evidently, did the legislative debates over the Act contain any reference to race. Finally, all Wilmington legislators, black and white, voted for the Educational Advancement Act. In short, the record does not demonstrate that a significant purpose of the Educational Advancement Act was to foster or perpetuate discrimination through school reorganization." 393 F. Supp. at 439.

Having found that the Educational Advancement Act was not purposefully racially discriminatory, the District Court overlooked or misinterpreted the applicable law to arrive at a determination of unconstitutionality.

a. Use of the Compelling State Interest Test.

Although the District Court could find no intentional racial classification in the Educational Advancement Act, it constructed a racial effect. Immediately prior to the Act the Wilmington School District, like the Detroit School District, was a predominantly black district surrounded by predominantly white districts. Had there been no Educational Advancement Act this condition would have continued, and in fact it did continue after the enactment of the Educational Advancement Act because the Act made no change in the Wilmington School District boundaries. This non-action on the part of the State was seen by the District Court as an "effective" although not an "intentional" racial classification which required invalidation unless justified by a compelling state interest.

It is now crystal clear from this Court's opinion in *Washington v. Davis*, 416 U. S. 229 (1976), that the Dis-

trict Court erred in overlooking *Wright v. Rockefeller*, 376 U. S. 52 (1964), and *Jefferson v. Hackney*, 406 U. S. 535 (1972), and that it misread *Keyes v. School District No. 1*, 413 U. S. 189 (1973):

> "The rule is the same in other contexts. *Wright v. Rockefeller*, 376 U. S. 52 (1964), upheld a New York congressional apportionment statute against claims that district lines had been racially gerrymandered. The challenged districts were made up predominantly of whites or of minority races, and their boundaries were irregularly drawn. The challengers did not prevail because they failed to prove that the New York legislature 'was either motivated by racial considerations or in fact drew the districts on racial lines'; the plaintiffs had not shown that the statute 'was the product of a state contrivance to segregate on the basis of race or place of origin.' 376 U. S., at 56, 58. The dissenters were in agreement that the issue was whether the 'boundaries . . . were purposefully drawn on racial lines.' 376 U. S., at 67.
>
> "The school desegregation cases have also adhered to the basic equal protection principles that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of *de jure* segregation is 'a current condition of segregation resulting from intentional state action . . . the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate.' *Keyes v. School District No. 1*, 413

U. S. 189, 205, 208 (1973). See also *id.*, at 199, 211, 213. The Court has also recently rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact of various provisions of the Social Security Act because 'the acceptance of appellant's constitutional theory would render suspect each difference in treatment among the grant classes, however lacking the racial motivation and however rational the treatment might be.' *Jefferson v. Hackney,* 406 U. S. 535, 548 (1972). And compare *Hunter v. Erickson,* 393 U. S. 385 (1969), with *James v. Valtierra,* 402 U. S. 137 (1971)." 44 U. S. L. W. 4792.

b. Causing Interdistrict Segregation.

The District Court considered the provision of the Educational Advancement Act limiting newly consolidated school districts to a maximum of 12,000 and the provision retaining Wilmington's historic, neutrally established boundary lines and found these provisions unconstitutional. Specifically, the Court found that these provisions were "a substantial cause of interdistrict segregation" and thus a basis for interdistrict remedy under the reasoning of *Milliken* (393 F. Supp. 439). Such interdistrict racial disparity antedated the Educational Advancement Act by many years and it was plainly erroneous for the District Court to equate inaction after the event with causation. The District Court's real quarrel with the Educational Advancement Act was that it did nothing to alleviate the *condition* of a predominantly black school district surrounded by predominantly white school districts. This same *condition* which existed in Detroit was held by this Court not to offend the Constitution. The Michigan legislature had the power to alleviate this condition by consolidation of Detroit with suburban school districts but it

had no constitutional obligation to do so. By the same token, neither the Delaware General Assembly nor the State Board of Education had any constitutional obligation to provide racial homogeneity among the separate autonomous school districts in New Castle County. *Spencer v. Kugler,* 326 F. Supp. 1235 (D. N. J. 1971), aff'd. mem. 404 U. S. 1027 (1972); *Bradley v. School Board of Richmond,* 462 F. 2d 1058 (4th Cir., 1972), aff'd. by equally divided court, 412 U. S. 92 (1973); *Milliken v. Bradley, supra.*

c. Drawing or Redrawing School Boundaries.

The District Court adopted respondent's contention that an interdistrict remedy was permissible because the Educational Advancement Act unconstitutionally contributed to interdistrict segregation by redrawing school district boundaries.

> "In short the General Assembly 'contributed to the separation of the races by . . . redrawing school district lines.' Milliken v. Bradley, at 755, 94 S. Ct. at 3132 (Stewart, J., concurring)." 393 F. Supp. 445-6.

The fallacies here are fourfold. First, the Wilmington School District boundaries were neutrally confirmed by legislation in 1905 as coterminous with the City of Wilmington where they had been for the preceding fifty years. The Educational Advancement Act made no change in these boundaries. Second, Chief Justice Burger's opinion in *Milliken* spoke of district lines "deliberately drawn on the basis of race." The District Court conceded in its opinion that nothing in the Educational Advancement Act was deliberately racial. Third, the Chief Justice and Mr. Justice Stewart illustrated their concern about contributing to segregation through drawing or redrawing district lines by referring to *Wright v. Council of the City of*

Emporia, 407 U. S. 451 (1972), and *United States v. Scotland Neck City Board of Education*, 407 U. S. 484. Unlike Wilmington, these were cases of new district lines actually drawn for the purposes of impeding desegregation. Fourth, the remedy commensurate with such violation in the cited cases was to set aside the school district lines which had been deliberately drawn on the basis of race. The inapplicability here of a remedy commensurate with the violation simply demonstrates that there was no violation.

C. Inclusion of New Castle-Gunning Bedford School District in the Desegregation Area Exceeded the Lower Court's Authority Under the Decisions of This Court.

In *Hills v. Gautreaux*, 425 U. S. 284 (1976), Mr. Justice Stewart explained *Milliken:*

> "The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation."

New Castle-Gunning Bedford School District is a separate autonomous school district. It is not adjacent to Wilmington School District and it is not a suburb of Wilmington. The focal point of New Castle-Gunning Bedford School District is the historic City of New Castle. New Castle-Gunning Bedford School District is a governmental entity which has not been implicated in any constitutional violation. Nevertheless, under the remedial order of the District Court this governmental entity will be abolished and its operations will be completely restructured. The boundaries of this separate, autonomous school district,

whose urban core is the City of New Castle, will be set aside by the Court despite the fact that the record fails to show any constitutional violation within the New Castle-Gunning Bedford School District, let alone a constitutional violation which has produced a segregative effect in the Wilmington School District.

The essential holding of *Milliken* is set out in the following language written by Mr. Chief Justice Burger:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann,* 402 U. S., at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. *Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.* Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for interdistrict remedy." (emphasis added). *Milliken v. Bradley,* 418 U. S. 717, 744-45.

In the context of this case New Castle-Gunning Bedford School District cannot properly be included in an interdistrict remedy unless (1) there has been a constitutional violation within New Castle-Gunning Bedford School District which has produced a significant segregative effect in Wilmington School District, or (2) the racially discriminatory acts of New Castle-Gunning Bedford School District or the State of Delaware have been a substantial cause of interdistrict segregation between New Castle-Gunning Bedford School District and Wilmington School District.

The District Court attempts to justify inclusion of districts like New Castle-Gunning Bedford referring to the effects of the pre-*Brown* segregation to which they were parties. Prior to *Brown* black students residing in Wilmington were segregated on an *intra-district* basis by reason of the dual school system in Wilmington; and some black students outside Wilmingon were segregated on an interdistrict basis by being required to attend the "colored" schools in Wilmington when there were not enough black students to justify a separate "colored" school in the district in which they lived. In pre-*Brown* days New Castle-Gunning Bedford School District did not have enough black students for a separate high school and these students crossed into Wilmington to attend the "colored" high school there. This is the only pre-*Brown* interdistrict segregation to which New Castle-Gunning Bedford School District was a party. This pre-*Brown* interdistrict segregation did not discriminate against black residents of Wilmington. The victims of this constitutional violation were black students residing in New Castle-Gunning Bedford School District; their constitutional rights were restored more than fifteen years ago and the effects of such segregation have long since been fully dissipated. In fact, the

District Court expressly recognized that the interdistrict transfer program ceased after *Brown* I.

The District Court conceded that it could not say that the "constitutional violation" attributable to the State in the Educational Advancement Act had any interdistrict effect between Wilmington School District and New Castle-Gunning Bedford School District. The same reasons given by the District Court for the inclusion of Newark School District apply to the inclusion of New Castle-Gunning Bedford School District, viz.:

> "It is difficult to say with any certainty that Newark would have been included in any reorganization had the State Board been entitled to exercise its discretion in 1968. Since Newark at that time had close to 12,000 students, the effect of the enrollment limitation may have been to foreclose Newark's inclusion. On the other hand, had the Legislature or the State Board considered desegregation as one of the appropriate goals to be accomplished in the course of reorganization, very different criteria might have led to the consolidation of part of either Wilmington or DeLaWarr with part of the present Newark district. We do not, however, rest our holding on such post hoc rationalizations, and on what might have been. Rather, uncontradicted testimony indicates that the stability of any desegregation plan is enhanced by the inclusion of larger geographical areas and higher white populations. The Court cannot ignore the fact brought so forcefully to its attention that desegregation is costly, in ways beyond dollars spent on additional equipment and training. The difficulties of declining tax bases, and the problem of preventing growth areas from maintaining the duality of schools in the Northern New Castle County area require the inclusion of Newark."

There are no dual school systems in Delaware. The Court uses "duality" for the concept that the percentage of blacks in the unitary Newark School District would be less than the percentage of blacks in the desegregation area.

Just as the District Court in *Milliken* sought to include suburban areas to remedy the *condition* it found in Detroit, so the District Court in this case has included New Castle-Gunning Bedford School District to remedy the *condition* it finds in Wilmington School District. With no showing that the "unconstitutional" features of the Educational Advancement Act had any interdistrict effect between Wilmington and New Castle-Gunning Bedford, the District Court mandated the inclusion of New Castle-Gunning Bedford to improve the stability of the desegregation area. "Stability" meant to the District Court the prevention of "white flight" which the District Court said could be included in the exercise of its informed discretion on what would constitute an appropriate remedy, citing *Wright v. Council of the City of Emporia,* 407 U. S. at 465, and *U. S. v. Scotland Neck Board of Education,* 407 U. S. at 490-91. But these were single-district cases and it was permissible to consider white flight in devising an intradistrict remedy for constitutional violations within the district. White flight, however, is not a constitutional violation. Even if it had been shown that whites will flee from Wilmington suburban areas to New Castle-Gunning Bedford School District in order to avoid desegregation (and this was not shown) such showing would furnish no legitimate basis for including New Castle-Gunning Bedford School District in the absence of its involvement in any constitutional violation.

The District Court in its March 27, 1975 opinion said that the victims of discrimination in this case are the school children of Wilmington. There is no showing that New

Castle-Gunning Bedford School District has itself performed any act contributing to discrimination against the school children of Wilmington. Nor is there any showing that any act of the State of Delaware has involved New Castle-Gunning Bedford School District in discrimination against the school children of Wilmington. In such circumstances there is no constitutional basis for including New Castle-Gunning Bedford School District in an interdistrict remedy to alleviate what the District Court has (mistakenly) called segregation in the Wilmington School District.

D. The Use of Racial Disparity and the Restructuring of More Than Half the Educational System of Delaware Exceeded the Court's Authority.

This Court recognized in *Swann* that the "predicate" for the District Court's use of a 71% to 29% ratio was its finding of a dual school system and a total default on the part of the school board to come forward with an acceptable plan, notwithstanding the patient efforts of the District Judge who, on at least three occasions, urged the Board to submit plans. It was this predicate that allowed the use of racial ratios as a "starting point" in the formulation of a remedy.

This predicate is absent here. The only "dual system" in Delaware is the disparity in racial percentages among the twelve separate unitary school districts in New Castle County, a condition which this Court has said does not offend the Constitution.

It seems plain that the Court below has done what *Swann* says it cannot do.

> "If we were to read the holding of the District Court to require, as a matter of substantive constitutional

> right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." (402 U. S. at 24.)

Unlike many states there is no relationship in Delaware between the school districts and the counties. The determination of the District Court to establish essentially all of New Castle County as a single school district approximately five times larger than any district now in existence anywhere in the State is an unwarranted interference with the internal governance of the State of Delaware for which there is no constitutional justification. The tradition of local control over the operation of schools which this Court recognized as essential both to maintenance of community concern and support of public schools and to quality of education has been set aside by the Court below because of its erroneous belief that Delaware is obligated to provide racial balance among the twelve separate autonomous school districts in New Castle County. To permit the involuntary restructuring of the school districts of Delaware on so faulty a premise will achieve an impermissible result—one which is plainly contrary to the controlling standards expounded in the holdings of this Court.

E. What Did the Summary Affirmance of 393 F. Supp. 428 (1975) by This Court in 423 U. S. 963 (1975) Determine?

The only constitutional violation upon which the District Court specifically relied (*Evans v. Buchanan*, 393 F.

Supp. at 445) was the Delaware Educational Advancement Act of 1968 (56 Del. L., Ch. 292) neglecting to mention that in its previous opinion (379 F. Supp. 1218) the Court had found there was no intentional racial classification in the adoption of this statute. Furthermore, by its terms, said statute was in effect for a period of only one year, and had expired some years before the Court rendered its opinion in 1975. The District Court did mention in passing several other possible constitutional violations, heretofore considered, but there was no evidence and the District Court made no findings on what effect, if any, such other constitutional violations had on the racial composition of the Wilmington public schools. As noted above, the Act prevented the State Board of Education for a period of one year from consolidating the Wilmington School District with any school district outside of Wilmington. The District Court referred to the statute as the racially discriminatory exclusion of Wilmington, because for one year it prevented Wilmington from being consolidated with a school district outside of Wilmington, and stated:

> "But for this racial classification, the Board may have consolidated Wilmington with other New Castle County districts, with the result that the racial proportions of the districts would have been altered significantly."

There was no evidence whatsoever that supported the Court's reference to a "racial classification"; as a matter of fact, the same statute also prevented the consolidation of two other New Castle Districts because of their large size (more than 12,000 pupils). Also, there was no evidence and the Court made no finding that Wilmington would ever be consolidated with another District outside the city, nor in what respect the racial proportions of any such

possible consolidated district would be altered. The Court concluded that the Educational Advancement Act played a significant part in maintaining the racial identifiability of Wilmington and was equivalent to redrawing school district boundary lines. On this basis the Court found that applicable law (*Milliken v. Bradley*, 418 U. S. 717 (1974)) authorizes consideration of inter-district as well as Wilmington only remedies for school "segregation" in New Castle County. The Court determined that the Educational Advancement Act of 1968, excluding Wilmington from consolidation was unconstitutional, and then directed the parties to submit to alternative plans to remedy the segregation in Wilmington as found by the Court in 379 F. Supp. 1218 (1974), "(a) within the present boundaries of the Wilmington School District, and (b) incorporating other areas of New Castle County".

A direct appeal from this interlocutory judgment was taken to this Court and there was a summary affirmance in *Buchanan v. Evans*, 423 U. S. 963 (1975), with three Justices dissenting. The dissenting Justices (Mr. Justice Rehnquist, joined by the Chief Justice and Mr. Justice Powell) did not know what issues the Court resolved by its summary affirmance. The dissenting opinion pointed out that the injunction on the Educational Advancement Act was moot since it had expired in 1969, and that an interlocutory order finding an interdistrict violation and requiring submission of plans was not appealable. *Bradley v. Milligan*, 468 F. 2d 902 (C. A. 6), *cert. denied* 409 U. S. 844 (1972).

The majority of the Court of Appeals in its opinion (A12-13 of Del. State Board of Ed. Petition) found that under the law of the case principle it was required by this Court's summary affirmance to accept that eight possible constitutional violations had been found by this Court and should accordingly be the subject of a remedy, saying (A13):

> "If the defendants believe that some of the eight alleged violations were not affirmed, they should take, or perhaps previously should have taken, appropriate steps to obtain review of this matter, or a clarification, by the Supreme Court."

The majority of the Court of Appeals also refused to consider whether this Court's summary affirmance was altered by *Washington v. Davis*, 426 U. S. 229 (1976), saying:

> "The short answer is that it remains for the Supreme Court, not an 'inferior' tribunal to entertain this contention."

Consequently, only this Court can determine what it decided in its summary affirmance of 1975 (423 U. S. 963). It is submitted that the consideration of the possible constitutional violations discussed *supra* in this petition shows that none of said alleged constitutional violations meets the criterion established by this Court in the cases heretofore cited. It is unreasonable to believe that this Court ever intended by its summary affirmance to do anything more than find at that point in these proceedings the District Court had not abused its discretion in ordering the submission of alternative plans, and that on remand to the Court of Appeals it should be instructed to consider all the alleged constitutional violations, what are the interdistrict violations, if any, with which we are concerned, and what effect, if any, do those violations now have on the racial composition of the schools of northern New Castle County, Delaware.

This Court should also consider that the basic premise upon which this case is founded rests on the decision of the three judge District Court in *Evans v. Buchanan*, 379 F. Supp. 1218 (1974), which held that there was uncon-

stitutional segregation in the Wilmington public schools by reason of demographic changes in the racial balance of the city whereby the racial composition of city schools changed from a black minority to a black majority of eighty percent from 1956 to 1973. This Petitioner was not made a party to this suit until after that decision was made and no appeal was taken from that decision. However, it would appear to be erroneous under the law as stated by this Court in *Pasadena City Bd. of Education v. Spangler*, 96 S. Ct. 2697 (1976). That case also recognized (at p. 2705) that there are well established rules governing modification of even a final decree in equity, so that if the standards now plainly stated by this Court in 1976 would not have justified the finding of segregation in Wilmington made in 1974, this Court should now review this 1974 decision of the District Court and if it does not meet existing law, remand for appropriate modification.

F. It Is Not Possible to Impose a "But for" Remedy on the Record in This Case, and the Court of Appeals Was in Error in Directing the Remedy Which It Approved.

The remedy invoked by a majority of the District Court (A84) was to establish a standard that a range of between 10 and 35% black in each grade of each school of all the school districts in New Castle County except one would determine desegregation. The District Court recognized the principle to be followed, saying (A58): "The Supreme Court has made it clear that the determination of the violation is a key factor in determining remedy." Nevertheless, without any finding of what violations it was trying to remedy, with the sole exception of the Educational Advancement Act of 1968, the District Court determined that some sort of consolidation or reorganization is required. It directed the State to accomplish some reorganization that

would accomplish the racial balance in eleven school districts it had prescribed, and if the State failed to do so the Court in effect consolidated all the school districts in New Castle County, except one district, into a single county-wide district with a new appointed board to supervise the new district. All the existing eleven school districts and their respective boards would be abolished. The transfer of responsibility to the new board becomes effective in September 1977. Not one word was said about the mechanics of accomplishing this transformation, except that the new board of education would have "full responsibility".

The majority of the Court of Appeals again emphasized the necessity of a "but for" remedy, but the only part of the District Court's judgment which it modified was the racial quota enrollment criterion, saying "we specifically hold that no particular racial balance will be required in any school, grade, or classroom." (A19). However, as the minority opinion of the Court of Appeals points out (A25), the majority opinion did not address two critical issues: 1. What are the interdistrict violations, if any, which are involved, and 2. What effects, if any, do those violations now have on the racial composition of the schools of northern New Castle County? The minority opinion stated:

> "I must confess if I were a Delaware official charged with desegregating the schools of northern New Castle County 'in accordance with the Opinion of the Court of Appeals for the Third Circuit,' I would not know where to begin."

We agree. It is not possible to comply with the requirements of this Court that the scope of the remedy must fit the nature and extent of the constitutional violation, unless and until the parties know the particular constitu-

tional violations with which they are charged, and what significant segregative effect did such violation have on the black school children of Wilmington. The record in this case fails to furnish the basic facts to determine what remedy, if any, should be imposed.

CONCLUSION.

The unarticulated premise on which the Courts below acted was the decision to make the racial balance in all schools in New Castle County, Delaware, approximately the same as the racial balance throughout the county, despite the fact that in New Castle County, Delaware, there are twelve separate, autonomous districts—only one of which was found to contain vestiges of the pre-*Brown* segregation which was mandated by the Delaware constitution. On the basis of specious attempts to show an interdistrict constitutional violation the District Court (affirmed by the Court of Appeals) uprooted the historical pattern of education in New Castle County, Delaware, drastically reduced school board representation, set aside neutrally established boundaries of eleven autonomous school districts, forced new financing patterns and taxes on the citizens of Delaware, and changed the educational patterns of 60 percent of the public school students in the entire State of Delaware.

The central theory to support this interference with the internal governance of Delaware is the unwarranted conception of *Brown's* command to dismantle the dual system of education. After *Brown*, racial minority pupils were freely admitted into the schools in the district in which they resided and no school district boundaries were altered to discriminate against any pupil of a racial minority. After *Brown*, there were twelve unitary school districts in New Castle County, Delaware, and no pupil in

any of these districts was excluded because of race from any school in the district in which he resided. This was full compliance with *Brown's* command to achieve desegregation "within the limits set by normal geographical school districting." 347 U. S. at 495-6, 349 U.S. at 298.

The Courts below say that Delaware was obligated to do more, that it was required to achieve racial balance among the twelve unitary school districts in New Castle County. Delaware's failure to do this in 1968 as part of the Educational Advancement Act is said to violate its continuing duty under *Brown* to desegregate the schools of Delaware. This is in direct conflict with *Bradley v. School Board of the City of Richmond*, 462 F. 2d 1058, 1069 (4th Cir. 1972), aff'd. by equally divided court, 412 U. S. 92 (1973); and is contrary to *Milliken v. Bradley*, 418 U. S. 717 (1974).

The refusal of the Court of Appeals to follow this Court's prior decisions requires a further authoritative statement to put such issues to rest. While this is of paramount importance to the citizens of Delaware, it has nationwide implications which commend it to full-scale review and reversal by this Court.

Respectfully submitted,

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